

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONYELLE FERDINAND WOODS,

Defendant-Appellant.

UNPUBLISHED

September 27, 2005

No. 254993

Wayne Circuit Court

LC No. 03-011636-01

Before: Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to life imprisonment for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred by failing to instruct the jury sua sponte regarding addict informer testimony. Defense counsel expressed satisfaction with the jury instructions, however, and therefore waived the issue. The statement by defense counsel resulted in a waiver that extinguished any error. *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000).

Defendant next argues that trial counsel was ineffective for failing to present exculpatory evidence at trial. We disagree. Defendant has not preserved the issue of ineffective assistance of counsel for review. To preserve the issue for review, a defendant must move for a new trial or evidentiary hearing. *People v Sabin*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Defendant did not move for a new trial and his motion to remand for a *Ginther*¹ hearing was denied, and, therefore, this Court's review is limited to the mistakes apparent on the record. *Id.*, pp 658-659. A trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant argues that he was denied the effective assistance of counsel because his trial counsel failed to present the alibi witness testimony of Victoria Covington and failed to present the witness statement of Shaye Renee Taylor. To establish a claim of ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In ascertaining whether effective assistance was rendered, a court will not second-guess counsel in matters of trial strategy. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003).

At defendant's first trial,² Covington testified that she is the mother of defendant's three children. She stated that in all of 2003, defendant did not wear his hair in braids and did not own a 1991 or 1993 Cutlass or Toyota Corolla in May 2003. She stated that defendant's only nickname is "Fir." Covington stated that on May 8, 2003, at 1:00 a.m., defendant was at home. Defense counsel did not present Covington's testimony at the subsequent trial.

A defendant claiming ineffective assistance of counsel must overcome a strong presumption that counsel's tactics were matters of sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). In this case, defense counsel may have determined that the previous jury did not react well to Covington's testimony or that her exculpatory testimony was not believable.³ Indeed, we note that the prosecutor, at the first trial, elicited that Covington did not think it was important to tell the police that defendant had allegedly been at home with her at the time of the shooting incident. It is presumable that defense counsel made a strategic decision not to have Covington testify at the second trial or to attempt to introduce Covington's statement under MRE 804(b)(1) if she was unavailable. We conclude that defendant was not denied the effective assistance of counsel with regard to the issue of Covington's possible testimony.

Shaye Renee Taylor did not testify at the first trial, but she provided a witness statement to the police on May 8, 2003. In the statement, she indicated that she witnessed a man in a white or cream jogging suit shoot a gun five or six times into a crowd. She described the shooter as a black male, twenty-four or twenty-five years of age and five feet six inches tall, weighing 175-180 pounds, with a medium complexion, a thin beard, and a mustache. At the first trial, defense counsel stated that the whereabouts of Shaye Renee Taylor were unknown. Therefore, it is presumed that she was unavailable to testify. Thus, it must be determined whether trial counsel was ineffective for failing to introduce her statement to the police under MRE 804(b)(7).

MRE 804(b)(7) is a hearsay exception, which reads, in part:

(7) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of

² On January 5, 2004, through January 8, 2004, an initial trial was held; a hung jury resulted.

³ We note that the same defense attorney represented defendant at both trials.

trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Shaye Renee Taylor's statement to the police would be offered as evidence of a material fact because it would be offered to show that the man in the white jogging suit, and not defendant, shot Harris. It would also be more probative than other evidence on the point regarding which it would be offered, because it is an eyewitness account of the events and, if found to be trustworthy, it would serve the general purpose of the rules to admit the statement.

However, we emphasize that a hearsay statement under MRE 804(b)(7) must show a particularized guarantee of trustworthiness. *People v Katt*, 468 Mich 272, 289-293; 662 NW2d 12 (2003); *People v Welch*, 226 Mich App 461, 466-467; 574 NW2d 682 (1997). When making this determination, the totality of the circumstances should be considered. *Katt, supra*, pp 290-291; *Welch, supra*, pp 467-468. *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000), summarizes factors some used to establish the indicia of reliability for purposes of the catch-all exception:

(1) the spontaneity of the statements; (2) the consistency of the statements; (3) lack of motive to fabricate or lack of bias; (4) the reason the declarant cannot testify; (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence; (6) personal knowledge of the declarant about the matter on which he spoke; (7) to whom the statements were made, e.g., a police officer who was likely to investigate further; and (8) the time frame within which the statements were made. The court may not consider whether evidence produced at trial corroborates the statement. [Citations omitted.]

Without a showing of trustworthiness, a statement will be deemed presumptively unreliable and therefore inadmissible. *People v Smith*, 243 Mich App 657, 688; 625 NW2d 46 (2000). Shaye Renee Taylor's statement does not bear sufficient indicia of reliability to have been admissible at trial. The statement was not made contemporaneously with the incident, which occurred about 1:00 a.m.; rather it was made at 8:00 p.m. There is an uncertainty about whether she had a motive to fabricate, how the police happened to take her statement, her exact location in witnessing the shooting, and the reason that she was unavailable to testify. Cross-examination of the witness regarding this statement would have been particularly useful. Therefore, we conclude that the statement does not qualify for admission under MRE 804(b)(7), and trial counsel was not ineffective for failing to move for the admission of the statement, because counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Bill Schuette